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IN THE

Supreme Court of the United States

OCTOBER TERM—1959

No. 727

CHARLES KENNEDY,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN, ETC.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN, ETC.

To the Honorable, the Chief Justice and Associate Justices, of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review judgment of the Supreme Court of Michigan (entered in the above entitled cause on October 12, 1959 by which his application for leave to appeal to said Court was

denied and denial affirmed on November 27, 1959) and also to review judgment below of Recorder's Court for City of Detroit (December 1, 1958) and Order Denying New Trial therein (May 29, 1959).

OPINIONS BELOW

No opinion was issued by the Supreme Court of Michigan when it denied application for leave to appeal from judgment and sentence to life imprisonment in Recorder's Court for City of Detroit nor when it later affirmed its order on motion for reconsideration. Opinion of Honorable John P. O'Hara, Judge of Recorder's Court with respect to motion for new trial is not reported. A copy is attached hereto (Appendix 11a) together with judgment of Recorder's Court and respective orders of the Supreme Court of Michigan (App. 24a, 25a).

JURISDICTION

I. Application for leave to appeal from judgment and sentence in Recorder's Court for City of Detroit, is required by C. L. Michigan 1948 770.3 (*People v. Stanley*, 75 N. W. 2nd 39).

II. Affirmance of its order denying such leave was entered on November 27, 1959, when the Supreme Court of Michigan acted on petitioner's motion for reconsideration.

III. Petitioner here and now seeks review and reconsideration which was not made available to him in the highest court of Michigan. In the alternative, this pursues petitioner's remedies in conformance with c. 646, 62 Stat. 967 (28 U. S. C. 2254). Jurisdiction of this Court to issue a Writ of Certiorari is conferred by c. 646, 62 Stat. 929 (28 U. S. C. 1253 (3)).

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner was denied equal protection of the laws and procedural due process (Const. Amendment 14, Sec. 1) by actions of the Trial Judge, (left standing by the Supreme Court of Michigan) with respect to petitioner's being tried and found guilty by a jury after he had requested a trial by the Court and tendered a signed statutory waiver of jury?

2. Whether petitioner was denied procedural due process by denial of motion for mistrial (left standing by the Supreme Court of Michigan) following reference in the prosecutor's opening statement to the jury regarding convictions of two other persons on the same charge at a previous trial?

3. Whether the charge of the jury, by the Trial Judge, (left standing by the Supreme Court of Michigan) contained an equivocal statement of law on the issue of insanity, shifting the burden of proof onto petitioner?

4. Whether petitioner was denied procedural due process by the ruling of the Trial Judge (left standing by the Supreme Court of Michigan) when before opening his defense, his request was refused for names of witnesses whom the prosecutor proposed to call as rebuttal witnesses on the issue of petitioner's insanity.

STATUTES INVOLVED

C. L. Michigan, 1948, 770.3.
C. L. Michigan, 1948, 763.3.
C. L. Michigan, 1948, 763.4.
C. L. Michigan, 1948, 768.20.
C. L. Michigan, 1948, 768.23.

Due to their length, these are set forth in Appendix, pp. 1a, 2a.

STATEMENT OF THE CASE

The matter herein involves denial of application for leave to appeal by the Supreme Court of Michigan and later affirmance of said denial from petitioner's conviction and sentence on an information dated in July, 1958, charging him with the first-degree murder of one, Louis Busker, on May 22, 1953. Notice of defense of insanity at the time of commission of the alleged offense was given by petitioner's attorneys on August 21, 1958.*

Verdict by the jury of Murder in the first degree was reached on November 12, 1958. Sentence was pronounced on December 1, 1958 by Hon. John P. O'Hara, Judge of

*Defendant previously had been named in an information, dated May, 1953 together with two others charging all three with the same offense. Upon notice of defense of insanity at the time, a three-Psychiatrist board was appointed by the Court to examine defendant. On August 22, 1953 they reported that because of mental derangement, defendant could not adequately understand the nature of the charge against him and his relationship to it, and could not adequately aid and assist counsel in his own defense. On the same day an order committing him to the State Hospital at Ionia, Michigan was made. On July 14, 1958, the Medical Superintendent of the State Hospital gave notice of defendant's recovery. He was released from the hospital and delivered to custody of the Sheriff for Wayne County.

Recorder's Court. Petitioner is presently serving his imprisonment for life in Jackson State Prison. A motion for new trial was filed and also, upon leave, an amended motion. These were denied, an opinion being filed May 29, 1959 (App. 11a).

At his trial no denial was made as to petitioner's participation with two others in an armed holdup on May 22, 1953, in the course of which petitioner had fired a shot from his gun killing said Louis Busker. Arrested with petitioner as they fled scene of the crime, petitioner's companions were tried in September, 1953, and each found guilty of muurder in the first degree and sentenced to life imprisonment.

Petitioner's trial was delayed until release, on July 14, 1958, from the State Hospital for the Criminally Insane at Ionia, Michigan to which he had been committed on recommendation of a Court-appointed commission, in 1953. Subsequent to his release, on report of a second Court-appointed commission that petitioner was not then psychotic and was able to assist counsel in his defense, his trial commenced on November 5, 1958.

(The following footnote references to appendix indicate portions of record where federal questions were raised.)

In expectation that if would be a jury trial, available jurors had been summoned to report to the Courtroom of Judge John P. O'Hara. Before prospective jurors arrived, petitioner's counsel stated a jury was being waived and handed the Court Clerk the official waiver form signed by petitioner in conformance with C. L. Michigan, 1948, 763.3.[1]

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[1] Waiver of Jury (App. 3a, 9a); Opinion on Motion for New Trial (App. 21a).

Thereupon Judge O'Hara called petitioner's counsel and the assistant prosecuting attorney up before the bench and out of the hearing of any prospective jurors (App. 13a, 14a).

The discussion which followed was off the record. It was initiated by the Trial Judge, who stated right out that he didn't want to try a murder case without a jury. Reluctant to permit expression of any claim that insanity was the principal issue and other protests of counsel for petitioner that he would prefer to have a trial by the Court, the latter declined to have the case proceed without a jury.

No consultation was permitted petitioner with his counsel regarding this change in the course of the trial.

Neither was a ruling made by the Court on the record with regard to the waiver (App. 3a). Sometime later a notation was made by the Trial Judge on the filed waiver itself as appears thereon: "Waiver Withdrawn—J.P.O." Counsel had no notice of this notation at the time.

After selection of the jury, the assistant prosecuting attorney made his opening statement.[2] In outlining the background of the case, he stated that Robert Kennedy and Bloomer Waddle, who participated in the offense charged against petitioner, had been tried in September, 1953 on a charge of first degree murder and were convicted by the jury (App. 4a).

Thereupon, the jury was excused at request of petitioner's counsel and a motion for mistrial made on the ground of such mention of conviction of the two co-defendants named in the first information, issued in May, 1953 (App. 4a). Petitioner was being now tried on a separate information (App. 10a).

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[2] Prosecutor's opening statement. (App. 4a-6a); Opinion on Motion for New Trial (App. 17a).

The Court agreed that the assistant prosecuting attorney should not have referred to said convictions. However, he denied the Motion for Mistrial. Upon recalling the jury, the Court told them that they should "* * * just forget that statement entirely and blot it out of your minds", (App. 6a).

He then asked if there were any jurors who could not do so to raise their hands. Whereupon the Court said, "Well, no hand was raised, so I assume you will just forget it and you will reach your conclusion on this case eventually based upon the competent testimony that is introduced" (App. 6a).

The Court concluded "So with that statement which I will expand a little further when it comes to my instructions to the jury we will proceed. Go ahead Mr. Kent".

The trial proceeded. Witnesses were presented and exhibits introduced by the Prosecutor to prove commission of the crime charged. After the prosecution's case was in and prior to opening petitioner's defense on the sole issue of insanity, a request was made by his counsel for the names of persons whom the assistant prosecutor intended to call as rebuttal witnesses.[3] This was refused and petitioner's request was overruled by the trial Judge.

Petitioner's counsel then moved for a mistrial on the same grounds that reference had been made of the conviction of two other defendants and also that testimony had been offered on the subject of malingering. This motion was denied as was a motion to reduce the charge to manslaughter.

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[3] Request for names of Prosecutor's rebuttal witnesses (App. 8a-9a); Opinion on Motion for New Trial (App. 18a-19a).

Petitioner's counsel's opening statement indicated the defense was insanity on May 22, 1953. No testimony was suggested or offered to dispute that the crime charged had been committed.

The remainder of witnesses offered by both sides were experts who testified on the subject of sanity or insanity of petitioner.

After the proofs were in, a motion for directed verdict was made by defendant's counsel and denied, arguments were presented, and the Court then charged the Jury.[4] Included in its instructions was the following:

> "So, getting back to the questions that you have before you, the first one is to determine whether the Defendant was mentally competent on May 22nd, 1953." • • •
>
> "So, if you come to the conclusion that, *beyond a reasonable doubt* the defendant was *not* of sound mind and was *not* sane on the 22nd day of May 1953, when the robbery was committed and the killing occurred, then you should find the Defendant Not Guilty because of Insanity." • • • (Emphasis added.)

This equivocal statement had the effect of shifting the burden of proof onto petitioner with respect to his sanity (App. 7a, 8a). Further, the Court's charge is silent on the subject of the reference by the Assistant Prosecutor to convictions of other persons on the same charge in a previous trial. The Court never did expand on its ruling made when the Jury returned to the Courtroom to hear the balance of the opening statement of the Assistant Prosecutor.

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[4] Charge of the Court (App. 7a-8a); Opinion on Motion for New Trial (App. 21a-23a).

The verdict of the Jury was that the petitioner was guilty of Murder in the first degree. Sentence was pronounced by the Court on December 1, 1958.

A motion for new trial containing seven grounds was filed on petitioner's behalf with time given to file an amendment when the transcript of testimony was available. An amended motion was filed in due time with additional reasons numbering from eight to twenty-two, both inclusive. Said motions were denied by Judge O'Hara, a written opinion being filed May 29, 1959 (App. 11a).

Following preliminary proceedings, an application for leave to appeal was filed with the Supreme Court of Michigan on the 15th day of July, 1959.

Leave having been refused on October 12, 1959 (App. 24a), a Motion for Reconsideration was filed on October 28, 1959. By Order entered November 27, 1959, the earlier order was affirmed (App. 25a).

REASONS FOR GRANTING WRIT

Petitioner's eight grounds set forth in Motion for New Trial and additional fourteen grounds in Amended Motion for New Trial were consolidated to nine in application for leave to appeal to the Michigan Supreme Court. These have been reduced to the four grounds stated in the Questions presented for Review, *supra*.

Such grounds, briefly stated are based on:

a. Interference with privilege of choosing between a non-jury or a jury trial.

b. Prejudicing jury by reference to prior conviction of others involved with petitioner.

c. Shifting burden of proof onto petitioner on issue of insanity in charging jury.

d. Refusal to furnish names of witnesses Prosecutor proposed to call to rebut petitioner's contention that he was insane on date of the offense charged.

The cumulative errors have been refined to present only those patently raising constitutional questions for consideration of this Court. The others as covered in the Trial Court's opinion (App. 16a), although not presently urged, nevertheless reflect the intolerable climate in which the jury was expected to determine the question whether the prosecution had sustained its burden of proving that petitioner was of sound mind and knew the difference between right and wrong on May 22, 1953, the date when the offense was committed.

The significance of these selected grounds is that they touch on basic problems common to most criminal trials. They are questions of substance and prejudicial in character since they deal with constitutionally created rights. Disregard thereof by denial of leave to appeal sanctioned such prejudice despite and contrary to decisions of the Supreme Court of Michigan which purport to guarantee due process and equal protection of the laws.

In the course of illustrating said point, petitioner also refers this Court to federal citations which support his position that the errors complained of are contra to decisions of this and subordinate federal courts.

Inevitably, denial of petitioner's application for leave to appeal by Supreme Court of Michigan compounded the miscarriage of justice in the Trial Court. Petitioner's sole avenue of relief therefrom, according to established procedure, is at the hands of this Court.

i

Essential to protection of an accused's rights under procedural due process is the atmosphere of a fair and impartial trial. To assure this it was the duty of the Trial Judge to direct the trial impartially and preserve to the accused his privilege to have the advice of counsel and to have a trial by jury or by the Court.

In the latter respect, unlike the rule in Federal Courts (Rules, Crim. Proc., 23a) the privilege of waiving a jury in a criminal case here is an absolute one. There is no requirement of consent by the State nor of approval by the Court. (C. L. Mich. 1948 763.3 and 763.4.) (App. 1a, 2a.)

The record here discloses that the Trial Judge did not honor the signed statutory form for Waiver of Jury. The jury was impaneled as if no waiver were submitted. The Trial Judge justifies this as resulting from a colloquy held with respective counsel which the Trial Judge has described (in his own words) in opinion denying motion for new trial (App. 14a).

It thinly veils the facts that said colloquy was initiated by the Court, influenced by the Court's thinking and in the end resulted in petitioner's counsel being *persuaded* without so much as a final conference being permitted with his client on this change in the course of the trial.

Patton v. U. S., 281 U. S. 276, 312;
People v. Sanford, 233 N. W. 192, 195;
Atty. Gen. v. Montgomery, 267 N. W. 550, 563-4.

ii

Similarly the Trial Judge failed to keep out of the trial a prejudicial statement made by the Prosecutor in his opening statement to the jury (App. 4a). After denial of a motion for mistrial, the jury was admonished to disre-

gard the statement and told that further instructions would be given thereon. No such instruction was given and it can only be assumed that the jury did remember since petitioner was found guilty. *People v. Ruggers*, 193 N. W. 861.

iii

To further maintain impartiality the Trial Judge's instructions should have avoided shifting the burden of proof of the major question of petitioner's insanity (App. 7a).

Injection of the phrase "beyond a reasonable doubt" (*supra* p. 8) removed responsibility of the Prosecutor to show that petitioner was sane on the particular day. Inadvertently perhaps, but very definitely, the burden was shifted to petitioner. This was not cured by the remainder of the charge. *Davis v. United States*, 160 U. S. 469; *Matheson v. United States*, 227 U. S. 540; *Drossos v. United States*, 2 Fed. 2nd 538, 539; *Nicola v. United States*, 72 Fed. 2nd 780, 788.

A conviction ought not to rest on an equivocal direction to the jury on a basic issue. *Bollenbach v. U. S.*, 326 U. S. 607, 613; *Yates v. U. S.*, 354 U. S. 298, 327.

The identical slip was held prejudicial by Supreme Court of Michigan in *People v. Ciamadya*, 132 N. W. 489, 492. See also *People v. Clark*, 65 N. W. 2nd 717.

iv

In upholding the Prosecutor's refusal to give names of his witnesses whom he proposed to call for rebuttal on issue of insanity, the Trial Court ignored Michigan decisions, (*People v. Rose*, 236 N. W. 536, 540; also, *People v. Smith*, 241 N. W. 186; *People v. Koukel*, 247 N. W. 738) in further violation of petitioner's constitutional right to a fair trial.

The Prosecutor's answer to the request was an outright refusal. No claim was made that such witnesses were not yet known nor could such a claim have in fact been made (App. 8a, 9a).

It is respectfully submitted that denial of leave by the Supreme Court of Michigan shut the door to review in a case with more than a mere ingredient of unfairness. Besides leaving petitioner subject to a life sentence, it could only have one other effect. Without available review, trials of others in such circumstances will also tend to be lacking that fundamental atmosphere of fairness contemplated by the law of the land and liberal application thereof by this Court in construing Section 1 of Article XIV of the Constitution.

CONCLUSION

For the foregoing reasons, this petition should be granted and a writ of certiorari be directed to the Supreme Court of Michigan and to the Recorder's Court for the City of Detroit which is possessed of the record for the purpose of reviewing the actions of said Courts hereinabove complained of.

Respectfully submitted,

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February 19, 1960.

APPENDIX

STATUTES INVOLVED

C. L. Michigan, 1948, 770.3

770.3 Writ of error; issuance.

Sec. 3. Writs of error in criminal cases shall issue only in the discretion of the supreme court or any justice thereof, on proper application therefor.

C. L. Michigan, 1948, 763.3

763.3 Waiver of trial by jury; form, time.

Sec. 3. In all criminal cases arising in the courts of this state whether cognizable by justices of the peace or otherwise, the defendant shall have the right to waive a determination of the facts by a jury and may, if he so elect, be tried before the court without a jury. Except in cases cognizable by a justice of the peace, such waiver and election by a defendant shall be in writing signed by the defendant and filed in such cause and made a part of the record thereof. It shall be entitled in the court, and cause and in substance as follows: "I, ..., defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury and elect to be tried by a judge of the court in which said cause may be pending. I fully understand that under the laws of this state I have a constitutional right to a trial by jury."

.....

signature of defendant.

Such waiver of trial by jury must be made in open court after the said defendant has been arraigned and has had opportunity to consult with counsel.

C. L. Michigan, 1948, 763.4

763.4 Same; jurisdiction of judge, procedure.

Sec. 4. In any case where a defendant waives his right to a trial by jury and elects to be tried by the judge of such court as provided in section 3 of this chapter any judge of the court in which said cause is pending shall have jurisdiction to proceed with the trial of said cause, and shall proceed to hear, try and determine such case in accordance with the rules and in like manner as if such cause were being tried before a jury.

C. L. Michigan, 1948, 768.20

768.20 Defense of alibi or insanity, notice to prosecutor; witnesses.

Sec. 20. Whenever a defendant in a criminal case not cognizable by a justice of the peace shall propose to offer in his defense testimony to establish an alibi on behalf of the defendant, or of the insanity of such defendant either at the time of the alleged offense or at the time of trial, such defendant shall at the time of arraignment or within 10 days thereafter but not less than 4 days before the trial of such cause file and serve upon the prosecuting attorney in such cause a notice in writing of his intention to claim such defense and the names of witnesses to be called in behalf of such defendant to establish such defense known to him at that time. Names of other witnesses may be filed and served before or during the trial by leave of the court and upon such conditions as the court shall determine. In cases of a claimed alibi such notice shall include specific information as to the place at which the accused claims to have been at the time of the alleged offense.

C. L. Michigan, 1948, 768.23

768.23 Exception; necessity of taking.

Sec. 23. It shall be not necessary in the trial of any criminal cause to except to any ruling or action of the court, if an objection thereto was fully made but an exception shall be deemed to follow as a matter of course.

PORTIONS OF RECORD WHEREIN FEDERAL QUESTIONS WERE RAISED

Proceedings had and testimony taken in the above-entitled matter before the Honorable John P. O'Hara, Judge of the Recorder's Court, and a jury, at Detroit, Michigan, commencing Wednesday, November 5, 1958.

Appearances: George D. Kent, Esq., Assistant Prosecuting Attorney, appearing on behalf of the People; James N. McNally, Esq., appearing on behalf of the defendant.

EXCERPT FROM PROCEEDINGS WITH RESPECT TO TRIAL BY JURY

(Vol. I, Page 2)

Detroit, Michigan,
Wednesday, November 5, 1958.
About 10:10 o'clock A. M.

(All parties present.)

Mr. McNally: May it please the Court, I represent the defendant Charles Kennedy, and I am filing forthwith a waiver of a trial by jury.

I have explained to the defendant that he has a right to be tried by a jury and told him of all of his constitutional rights, and he has told me that he would like to be tried by the Court without a jury. (Handing document to Court.)

The Court: All right.

(Brief pause.)

The Court: Aren't there any jurors available?

Court Officer: Yes, sir.

The Court: All right.

(Thereupon, at 10:23 o'clock A. M., the jury panel entered the courtroom and selection of the jury commenced.)

* * * * *

EXCERPT FROM PROSECUTOR'S OPENING STATEMENT

* * * * *

(9) We will show you members of the jury, that all three defendants were formally charged with committting the crime of first degree murder.

We will show you, members of the jury, that after the case was set for trial their then attorney, and in all due respect I must tell you that it was not Mr. McNally,—their then attorney filed a petition for a sanity commission stating that Charles Kennedy was unable to aid and assist him in his own defense.

We will show you, members of the jury, that an examination was made by three psychiatrists. We will show you that as a result of that examination it was determined by their examination that Charlie Kennedy was unable to aid and assist counsel in his own defense.

We will show you, members of the jury, that there was no finding made at all as to whether or not Charlie Kennedy was sane or insane at the time of the commission of this crime. Their determination merely went to his ability to aid and assist counsel in his own defense.

We will show you, members of the jury, that in the month of September, 1953, Robert Kennedy and Blumer Waddle were tried in this court building on the crime of, as charged here, first degree murder and were convicted by the jury.

(10) Mr. McNally: Any reference to any previous trial, your Honor, is highly prejudicial, and I ask at this time the jury be excused.

The Court: Very well. Step into your juryroom, if you will.

(Thereupon, the jury left the court room and the following proceedings were had in the absence of the jury):

Mr. McNally: At this time the defense moves for a mistrial based on the fact that he mentioned what occurred in other cases. I don't think it has a thing to do with the case at bar.

The Court: Whether or not the statement is a proper one or not would depend upon whether or not at the trial testimony to the effect that the other two were convicted would be admissible.

Now, would that testimony be admissible?

Mr. McNally: I say no, your Honor.

Mr. Kent: I say it would, your Honor.

* * * * *

The Court: * * *

(19) * * * Well, call the jury back.

(Thereupon, the jury returned to the courtroom and the following proceedings were had in the presence of the jury.)

The Court: Members of the jury, this legal question that has arisen is causing a little bit of concern, and since it is a legal question I am going to hold this matter over until tomorrow to give counsel an opportunity to study the law on the point and give me the benefit of their study.

I have a number of other matters so that I wouldn't be able to work on this this afternoon anyway, as I told counsel before we started. So we'll adjourn now until nine-thirty o'clock tomorrow morning, and Mr. Kent and Mr. McNally, you will be in at nine o'clock.

Mr. McNally: Yes, sir.

Mr. Kent: Yes, sir.

The Court: So you will be excused.

(Thereupon, the hearing on this matter was adjourned until Thursday, November 6, 1958.)

* * * * *

(34) The Court: Well, I understand that is your position, but I am going to instruct the jury on the point that is before me now, that they should pay no attention to it, has nothing—can not be considered in determining whether this defendant is guilty or innocent.

All right, call the jury out.

(Thereupon, the jury returned to the courtroom, and the following proceedings were had:)

* * * * *

The Court: Members of the jury, yesterday when we adjourned there was an objection made about a statement Mr. Kent had made to you to the effect that the other two who were involved in this matter were serving sentences at this time as a result of their participation in this same offense with which the defendant is charged here. I am going to tell you to just forget that statement entirely and blot it out of your minds. Later, at the conclusion of the case when I instruct you as to what the law is I will dwell a little further on it, but the defendant who is here now has a right to be tried upon the facts as they pertain to his own activities (35) and not upon what happened to anybody else. So just forget it. Now, I am going to ask you before we go further if there is any juror here who can't do that? If there is, just raise your hand.

Well, no hand was raised so I assume that you will just forget it and you will reach your conclusion on this case eventually based upon the competent testimony that is introduced. So with that statement which I will expand a little further when it comes to my instructions to the jury we will proceed.

Go ahead, Mr. Kent.

Mr. Kent: Thank you, your Honor.

* * * * *

EXCERPT FROM CHARGE TO JURY ON BURDEN OF PROOF ON ISSUE OF INSANITY

(Vol. III, Page 178)

Wednesday,
November 12, 1958.
2:25 o'clock P. M.

The People v. Charles Kennedy, Defendant

File No. A-72281

(The hearing of this matter was resumed pursuant to the adjournment.)

(Parties present same as before.)

(In the absence of the jury.)

The Court: Now, gentlemen, has either of the attorneys any written requests to charge?

Mr. Kent: I have none, your Honor. I think the general requests that the Court gives will be adequate.

Mr. McNally: I spoke to the Court on requests to charge and I understood that the Court would give the general charge and, therefore, I have prepared no requests, sir.

The Court: Very well, bring in the jury.

(Thereupon, the following proceedings were had in the presence of the jury.)

CHARGE OF THE COURT

* * * * *

(179) The Court: Members of the jury, at this point in the proceedings it becomes my duty to explain to you what the law is that applies to this case. It is somewhat involved and more so than the ordinary case because there are several crimes involved in what is charged here, and in addition to that, we have the defense that has been set up of insanity.

* * * * *

(195) So, getting back to the questions that you have before you, the first one is to determine whether the defendant was mentally competent on May 22nd, 1953. You heard some discussion here about whose obligation it was to prove sanity or insanity. The rule of law on the subject is this: Every person is presumed to be sane, and when the ordinary person is put to trial in a criminal matter it is the presumption that he is sane and of sound mind. However, when the defense introduced testimony which shows, or tends to show that the defendant was not of sound mind and was not sane, then the burden of showing that he was is upon the People just the same as it is in other proof required in a criminal case, to show that the defendant was sane beyond a reasonable doubt.

So, if you come to the conclusion that, beyond a reasonable doubt the defendant was not of sound mind and was not sane on the 22nd day of May, 1953, when the robbery was committed and the killing occurred, then you should find the defendant not guilty because of insanity. On the other hand, if you come to the conclusion that the defend-

ant, on May 22nd, 1953, was of sound mind and knew what he was doing and knew the difference between right and wrong, and so forth, as I defined it to you, if you should find that he is, was (196) sane on that day, then you turn to to the next question and that is what is he guilty of.

* * * * *

EXCERPT FROM PROCEEDINGS WITH RESPECT TO NAMES OF PROSECUTOR'S REBUTTAL WITNESSES

(Vol. II, page 10) * * * Mr. McNally: Your Honor, for the record, I move at this time that you direct a verdict of not guilty, on the basis that the People have failed to prove their case.

The Court: Well, for the reasons which I have stated your motion will be denied.

Mr. McNally: And I also ask that the matter be reduced from first degree murder to manslaughter, no premeditation has been shown.

Court: Well, I'll have to deny that, too.

Mr. McNally: Now, just before we call the jury, one more thing, if your Honor please. I have not received from Mr. Kent, and this is certainly not criticism, (11) I don't mean it in that, any list of witnesses which he intends to call as rebuttal.

As your Honor knows, I am entitled to know that the minute I enter upon my defense. I will say at this time we have the two psychiatrists standing here in the courtroom, Dr. Haarer of Ionia, and Dr. Gordon.

Now, I would like to know the list of witnesses, if any, which the prosecution intends to call as rebuttal.

Mr. Kent: I am not obligated to do that, may it please the Court. Let us assume I cannot anticipate the defense.

Mr. McNally: You are told now that the defense is insanity and that the psychiatrist will—

Mr. Kent: Well, I know it now. Even though you filed a notice, you didn't have to go through with that.

Mr. McNally: Well, are you going to call any—

Mr. Kent: I may. I'll see what develops.

The Court: I don't know any rule, Mr. McNally, that requires the prosecutor to hand you a statement.

Mr. Kent: This is brand new.

* * * * *

(14) * * * The Court: Well, do you expect to call Dr. Wallaert?

Mr. Kent: No. I'd just as soon have Mr. McNally call him.

The Court: All right. There's your answer, Mr. McNally. Now, are we ready to proceed?

Mr. McNally: Yes, your Honor.

The Court: Bring in the jury.

(Whereupon the jury entered the courtroom (15) at 9:52 a. m., all present.)

The Court: Well, let's go ahead. I'll deny that motion.

* * * * *

WAIVER OF TRIAL BY JURY

(Recorder's Court for the City of Detroit, No. A-72281. Offense Murder—First Degree)

At a session of the Recorder's Court for the City of Detroit held in said city on the 5th day of November, A. D. 1958:

Present: Hon. John P. O'Hara, Judge of Recorder's Court.

I, Charles Kennedy, being the defendant in the above entitled cause, having been arraigned therein on the charge of murder 1st degree and having had opportunity to consult with counsel, do hereby in open Court voluntarily waive and relinquish my right to a trial by jury and elect to be tried by a judge of the above named Court, in which this cause is pending.

I fully understand that under the laws of this state I have a constitutional right to a trial by jury.

Waiver withdrawn J.P.O.

(Signed) Charles Kennedy,
Defendant.

Dated November 5, 1958.

The above named defendant signed his name to the foregoing waiver of trial by jury in my presence on the above recited date.

James Malin,
Deputy Clerk.

PROCEEDINGS IN AND ORDERS OF COURTS BELOW

GENERAL INFORMATION

In the name of the People of the State of Michigan, Samuel H. Olsen, Prosecuting Attorney in and for the said County of Wayne, who prosecutes for and on behalf of the People of said State in said Court, comes now here in said Court in the July term thereof, A. D. 1958, and gives the said Court to understand and be informed that Charles Kennedy, late of the said City of Detroit, in said county, heretofore, to-wit, on the 22nd day of May, A. D. 1953, at the said City of Detroit, in the county aforesaid feloniously, wilfully and of his malice aforethought did kill and murder one Louis Busker; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Michigan.

Note—See Sec. 750.316 C. L. 1948.

Samuel H. Olsen,
Prosecuting Attorney.

Drafted by Benjamin F. Cornelius.

OPINION OF THE COURT ON MOTION FOR NEW TRIAL

(May 15, 1959)

(In chambers.)

Appearances: Mr. George Kent, Assistant Prosecuting Attorney, appearing on behalf of the People; Mr. James McNally (McNally & McNally), 2018 Guardian Building, Detroit, Michigan, appearing on behalf of the defendant.

OPINION OF THE COURT

In this matter, the defendant, through his attorney, James N. McNally (McNally & McNally, 2018 Guardian Building, Detroit, Michigan) has filed a request for a new trial for the defendant, Charles Kennedy.

On November 12, 1958, defendant Kennedy was found guilty of murder in the first degree by a jury. On December 1st, 1958, the defendant was sentenced, under the first degree murder statute, to life imprisonment in the State Prison for Southern Michigan at Jackson, Michigan.

The original motion for a new trial set forth seven reasons therefor, with leave to amend after the full transcript of testimony had been completed and delivered to Mr. McNally by the Court Reporter. An amended motion was filed in due time; which contained additional reasons, numbered 8 to 22, both inclusive.

Before entering upon a discussion of the various points of argument, the facts of the case should be stated:

FACTS

On May 22, 1953, Charles Kennedy, 28 years of age, together with Robert Kennedy, his brother, 23 years of age, and Bloomer Waddle, 19 years of age, entered premises at 4847 Trumbull Avenue, in the City of Detroit, where Louis Busker operated a business known as Community Service Bureau. The business done consisted mainly of selling money orders, collecting utility bills, and other services of a personal nature. All three had attempted to disguise

themselves by painting their faces with moustaches, eyebrows and other marking, to hide their identities so that persons in the Bureau who knew them, would not recognize them.

Charles Kennedy had a gun and each of the other two had a knife. Charles Kennedy announced: "This is a stick-up". Louis Busker, 78 years of age, who operated the Bureau, was seated at his desk. Other persons, doing business with Busker, were present. Charles Kennedy approached Busker, holding his gun before him. Busker attempted to open a drawer of his desk, whereupon Charles Kennedy's gun fired a bullet, piercing Busker's heart, causing almost immediate death. Charles Kennedy opened the desk drawer for which Busker reached and removed a gun. The other two defendants forcibly took about $30.00 from other persons in the place. Then, apparently alarmed by the shooting, all three ran from the place; Robert Kennedy jumping through a window.

It happened that as Robert Kennedy crashed through the window, two police officers across the street, giving a ticket for a traffic violation, heard the noise and saw the individuals run between the buildings on the street. One officer pursued and arrested Robert Kennedy almost immediately. The other officer, believing he could cut off one of the persons who ran between the buildings, drove the police car around the block and, in a few minutes, had arrested Charles Kennedy. The third member was arrested later that night.

Before trial, notice was given that Charles Kennedy was insane at the time of the alleged offense. Shortly thereafter a petition was filed by the Prosecuting Attorney for Wayne County to inquire into Charles Kennedy's sanity. A three-psychiatrist board was appointed to examine him and, on August 22nd, 1953, they reported that Charles Kennedy, because of mental derangement, could not adequately understand the nature of the charge against him and his relationship to it, and could not adequately aid and assist counsel in his own defense. On the same day, an order

committing him to the State Hospital at Ionia, Michigan, was made.

The trial of Robert Kennedy and Bloomer Waddle was held; each was found guilty of murder in the first degree, and sentenced to life imprisonment.

On July 14th, 1958, John G. Haarer, Medical Superintendent of Ionia State Hospital, gave written notice to the Recorder's Court that Charles Kennedy had recovered; was no longer a menace to the public, and was free of mental defect. He was released from the hospital and delivered to the custody of the Sheriff for Wayne County.

A new information was then filed against Charles Kennedy alone, charging him with the first degree murder of Louis Busker on the 22nd day of May, 1953. Notice of defense of insanity at the time of commission of the alleged offense was given by defendant's attorney on August 21, 1958. He gave further notice that Dr. William Gordon would be called as a witness for the defense. Thereafter, on August 26, 1958, the Prosecuting Attorney for Wayne County again petitioned the Court for the appointment of a commission to examine Charles Kennedy. Albert J. Wallaert, M.D., Chief Psychiatrist of the Recorder's Court Psychopathic Clinic; Albert C. LaBine, M. D., and a Thomas V. Hoagland, M.D., were appointed to make the examination. On September 16, 1958, the three physicians filed a report in which Charles Kennedy was found not psychotic and able to understand the charge against him and able to assist counsel in his defense.

On Wednesday, November 5, 1958, the trial of Charles Kennedy began. Expecting it would be a jury trial, available jurors had been requested to report to the courtroom of Judge John P. O'Hara. Before the prospective jurors arrived, Mr. McNally stated that Charles Kennedy waived his right to a jury trial and handed the Court Clerk the official waiver form, signed by Charles Kennedy. While the subject of waiver was being discussed with the respective attorneys, jurors filed into the courtroom. In this discussion it developed that although the name of Dr. Wil-

liam Gordon was the only one set out in the notice of defense of insanity filed by defense counsel that Dr. Albert J. Wallaert, Chief Psychiatrist of the Psychopathic Clinic of the Recorder's Court would also be called as a witness on behalf of the defendant. After considering the situation, the Court called James N. McNally and George Kent, respectively, before the bench and out of hearing of any prospective jurors discussed whether Mr. McNally might not be endangering his client's rights by waiving a trial by a sympathetic jury. The Court stated it was the defendant's right to be tried with or without a jury, as the defendant wished. After further discussion, Mr. McNally stated that he would withdraw the waiver and proceed with a jury. The Court then wrote on the face of the waiver: "Waiver withdrawn—J. P. O." Soon thereafter the drawing of jurors was under way. Nothing further was said by Mr. McNally about waiving jury trial and proceeding with the Court alone. The first time any objection was raised was when the motion for a new trial was made.

After both sides were satisfied with the jury, Mr. Kent proceeded with his opening statement. In outlining the background of the case, Mr. Kent stated that Robert Kennedy and Bloomer Waddle had been tried in September, 1953, on a charge of first degree murder and were convicted by the jury. Thereupon, Mr. McNally asked that the jury be excused; whereupon he moved for a mistrial because of the mentioning of the conviction of the two co-defendants. Considerable time was spent upon the point, and Supreme Court decisions on the point were reviewed. The Court came to the conclusion that Mr. Kent should not have mentioned the conviction of Robert Kennedy and Bloomer Waddle; relying upon prior decisions of the Supreme Court of this State denied the motion for a new trial; but recalled the jury and told them that they should "* * * just forget that statement entirely and blot it out of your minds". The Court then asked the jurors if there were any jurors who could not do so to raise their hands. Whereupon the Court said: "Well, no hand was raised, so I assume you will just forget it and you will reach your

conclusion on this case eventually based upon the competent testimony that is introduced".

Mr. McNally reserved the right to make a later opening statement. At the conclusion of the People's case, a motion to direct a verdict of not guilty on the basis that the People had failed to prove their case was made by Mr. McNally. The motion was denied.

In his opening statement to the jury, Mr. McNally said it was probably very evident to them that by sitting and saying to witness after witness "No questions", that the defense was insanity and that he intended to prove that, on the date of the shooting, May 22nd, 1953, Charles Kennedy was insane. He said that he would offer testimony showing such insanity and that the Court would charge them that the burden was upon the Prosecution to show that the defendant was sane.

At the conclusion of the trial, the Court charged the jury that four verdicts were possible in the matter: Guilty of first degree murder; guilty of second degree murder; guilty of manslaughter; or, not guilty because of insanity.

No witnesses had been called by the defense to contradict that offered by the People to show commission of the armed robbery and it was undisputed that the crime had been committed.

The jury, after deliberating, found Charles Kennedy guilty of murder in the first degree, and he was sentenced to life imprisonment in accordance with the mandatory provisions of the statute covering the subject.

POINTS RAISED BY THE DEFENDANT IN SUPPORT OF THE MOTION FOR A NEW TRIAL

The motion for a new trial contains 22 reasons for setting aside the jury's verdict. Some of these are repetitious and will be considered in conjunction with those of a similar nature.

1] and 2]: The first reason is that the verdict was contrary to law, and the second was contrary to the great weight of the evidence. Being of a general nature, whatever they cover would be contained in some of the other points raised.

3]: The defendant claims the Court erred in admitting a statement, or "confession" of the defendant, made within 12 hours of the crime. No error is perceived because of admission of the "confession". It was made up of questions and answers in which the defendant detailed the events leading up to the commission of the crime, as well as what occurred in what Charles Kennedy announced as a "stick-up", resulting in his firing the gun which killed Louis Busker. The People claimed that the statement, or "confession", was very clear and lucid and indicated that the defendant was of sound mind and knew precisely what he was doing before, during and after the commission of the crime. Dr. William Gordon, one of the defense' expert psychiatrists, stated on cross-examination that if Charles Kennedy had told him his story in the same way it was set forth in the "confession" that: "Well, I would not have felt that he was mentally ill on 25 June, 1953—my opinion would have been that he would have been able to distinguish right from wrong on 22 May 1953, if he had told me this story in just this way on 25 June 1953." [Page 38, Vol. 3 of typewritten transcript of testimony.]

4] and 16]: Defendant claims that Dr. Gordon was restricted in giving his testimony and prevented from fully perfecting the defense of insanity. The motion does not specify what this testimony was, nor does the brief filed in support of the point specifically call attention of the Court to any particular ruling restricting Dr. Gordon's testimony. No error appears with respect to Dr. Gordon.

5]: The defense claims that reference by Mr. Kent in his opening statement to the fact that Charles Kennedy's two co-defendants in the original information were convicted prejudiced the defendant's case. As is set forth in the foregoing statement of facts, the jury was admonished to forget and wipe from their minds Mr. Kent's statement about the fate of the two co-defendants. When the Court asked the jurors to raise hands if any could not so forget, no hands were raised and Mr. Kent proceeded with his opening statement.

In People v. Watson, 307 Michigan 596, commencing at page 605, a similar situation existed and during the trial reference was made by the Prosecutor to the fact that other defendants in the same matter had plead guilty. In denying the motion for a mistrial, Circuit Judge Pugsley said: "I charge you, as a matter of law, that any action taken or any statements made by any other defendants after the expiration of the time that it is alleged that this conspiracy existed is, in no way, binding upon any other defendant."

The Supreme Court, on page 605, said:

> "In our opinion, the error was corrected by the instruction given by the Trial Court, the Trial Court did not err in denying defendant's motion."

In the instant case, the defendant admitted that he and the other two persons mentioned committed the crime charged, but claims immunity on the ground of insanity. In the light of this situation it is difficult to see how any statements concerning the other defendants could, in any manner, harm his case which was based entirely on his insanity. No error is found here.

6]: Reference is made to permitting the Prosecuting Attorney to make reference to "others", whose names do not appear on the amended information. Who the "others" were and what was said is not set forth in the motion or in the affidavit in support of it, and there is no discussion of this point in the brief filed by Mr. McNally; consequently no error is shown.

7]: It is alleged that prejudicial misconduct of one juror existed. Nowhere is any support or reference on this point made. Inquiries by the Court developed that after the conclusion of Charles Kennedy's trial one juror was present at a "mock trial" based on the Kennedy case. If what the Court was told is true, it could have no bearing upon the present issues.

8]: It is claimed that the Court failed to instruct the jury in its final charge that previous references to the other two defendants should be disregarded. The Court was not requested so to do. A very specific admonition was given to the jury at the time the question first arose when Mr. Kent was making his opening statement to the jury, and that should be sufficient. Mr. McNally filed no written requests to charge. The Court did state what the theory of the defense was and told the jurors that the defense conceded a robbery was perpetrated and that Louis Busker was killed. The Court further stated in its final charge that if Charles Kennuedy was found to be sane there was no question about his guilt; the only issue being the degree of homicide of which he was guilty. No criticism has been made of what the Court said to the jury about the defendant's claim. It is difficult to see any harm that might come from knowledge by the jury of the conviction of the co-defendants since all facts connected with the robbery were conceded to be true.

9]: It is claimed that the Court erred in not requiring the People to furnish defense counsel with the names of prosecution witnesses to be called to show sanity. It was the claim of the Prosecuting Attorney that he could not give names of rebuttal winesses when he did not know the testimony that would be given by the defense experts. This objection is not serious enough to merit any further comment. The only witnesses called by the People were two psychologists connected with the Psychopathic Division of the Recorder's Court. These men worked under Dr. Wallaert, the Chief Psychiatrist, who was one of Mr. McNally's principal witnesses. The record is devoid of any damage that might have been caused to defendant's insanity claim

as a result of not knowing in advance who the People's witnesses would be.

10]: It is claimed the Court erred in permitting the prosecution to impeach its own medical witnesses. No specification of the particular error is set forth and, in the absence of it, this objection does not appear important.

11]: The defense charges the Court erred in admitting the testimony of William H. Bowen, a psychologist of the Court's Psychopathic Division. Mr. Bowen did not attempt to testify to the condition of the defendant on the date of the trial and only gave testimony with respect to what he, as a psychologist did in preparing data for the consideration of Dr. Wallaert.

12]: Error was charged because William H. Bowen testified to conversation with defendant in 1958, and in not permitting Dr. Gordon to testify to similar matters. No specification or detailing of this charge is made and it is not considered important.

13]: Error is charged because the Court allegedly permitted the Assistant Prosecuting Attorney to make unjust attacks on the integrity and professional standing of Dr. Albert J. Wallaert. No specification of this alleged error is given. The Court does recall that the Assistant Prosecuting Attorney brought forth from Dr. Wallaert that the record of proceedings concerning Charles Kennedy at Fort Knox, Kentucky, in 1943, did not show that Dr. Wallaert was connected with the situation then, as Dr. Wallaert orally claimed. If Dr. Wallaert claimed he passed upon the condition of Charles Kennedy in 1943, and the record of proceedings did not support his claim, then the Assistant Prosecutor should not be criticized because he brought that point to the attention of the jury.

14]: It is charged that the attempt to introduce a Fort Knox, Kentucky file through the Veteran's Administration of Detroit was prejudicial. When the file was first mentioned Mr. McNally's objection was that its contents were privileged. No ruling was made on this point but it is difficult to see how a matter of that kind would be privileged

where the defendant himself had placed his condition in issue and had introduced testimony of psychiatrists to support his claim. The Court, on its own volition, ruled that the file and its contents, not being within the personal knowledge of the witness who had produced it, was not proper evidence, basing that ruling upon an opinion of the Supreme Court to the effect that hospital records in criminal matters were not ipso facto admissible as in civil cases. No prejudice resulted from the offer and rejection of the file.

15]: The allegation under this number is similar to what is stated in 14], and is not considered prejudicial.

16]: This contention has been considered heretofore in connection with 4].

17]: Error is charged because the Court did not reprimand the Assistant Prosecuting Attorney for constantly interrupting witnesses. This is so general that it does not permit any further comment.

18]: It is claimed that error occurred in permitting the People to claim malingering. If the Assistant Prosecutor believed that Exhibit 8 was a clear and lucid statement of the details of the crime of robbery armed and that other statements of Charles Kennedy's, which the psychiatrists considered as bearing on his insanity, were not sincere and were made for the purpose of feigning insanity, then no harm could come from the Assistant Prosecutor making such an argument.

19]: This assignment repeats the malingering claim. The Assistant Prosecutor claimed malingering was shown when all the facts of Charles Kennedy's acts were taken into consideration. This, surely, was not error.

20]: It is claimed that the Court erred in permitting Lt. Ralph Oberle to read his notes concerning a conversation with the defendant. There is nothing cited in support of this allegation.

21]: This item again concerns Exhibit 8, the statement made by Charles Kennedy to the Prosecuting Attorney on

the day the crime was committed. The fact that it was an unsworn statement has no effect upon its admissibility. This particular point has been discussed hereinbefore and nothing prejudicial can be found in receiving the exhibit in evidence.

22]: This assignment claims the Court erred in impaneling a jury after the defendant had waived a jury trial. Hereinbefore, in the statement of facts, the circumstances surrounding the waiving of a jury trial are detailed, when it was suggested to Mr. McNally that, since Dr. Wallaert was to be one of his principal witnesses, it might be better to have a jury trial; he stated in the presence of Mr. Kent that he would proceed with a jury. At no time throughout the trial, or in the legal discussions, or during the instruction of the jury by the Court did Mr. McNally raise any question about being deprived of his right to a trial by the Court without a jury.

* * * * *

In the brief filed by Mr. McNally in support of his motion for a new trial it is argued that the Court erred in charging the jury with respect to insanity. No allegation to this effect is found in the motion for a new trial and the 22 specific allegations of error. In the defendant's brief he states further error is evidenced in the instruction of the Court when the Trial Court told the jury:

> "So, if you come to the conclusion that, beyond a reasonable doubt, the defendant was not of sound mind and was not sane on the 22nd day of May, 1953, when the robbery was committed and the killing occurred, then you should find the defendant not guilty because of insanity. On the other hand, if you come to the conclusion that the defendant, on May 22, 1953, was of sound mind and knew what he was doing and knew the difference between right and wrong, and so forth, as I have defined it to you, if you do find that he is, was sane on that day, then you turn to the next question, and that is: What is he guilty of?" [Vol. 3, page 196, typewritten transcript.]

It is difficult to conceive what criticism can be made of the charge as given. The jury was instructed that if they could not find the defendant sane beyond a reasonable doubt, they should find the defendant not guilty. That is a clear statement of the law. Immediately preceding the excerpt Mr. McNally has quoted, the following was stated to the jury by the Court:

> "So, getting back to the questions that you have before you, the first one is to determine whether the defendant was mentally competent on May 22, 1953—the rule of law on the subject is this: Every person is presumed to be sane, and when the ordinary person is put to trial in a criminal matter it is the presumption that he is sane and of sound mind. However, when the defense introduces testimony which shows or tends to show that the defendant was not of sound mind and was not sane, then the burden of showing that he was is upon the People, which is the same as it is in other proof required in a criminal case, to show that the defendant was sane beyond a reasonable doubt."

What the Court said immediately following that was that if the jury came to the conclusion that the defendant was not of sound mind and was not sane beyond a reasonable doubt on the 22nd day of May, 1953, they should find the defendant not guilty. It is difficult to conceive how a fairer statement as far as the defendant was concerned could be made.

If all that is said on page 195, concerning insanity, is read in context it is quite clear that the law as applied to defendant's insanity claim was as favorably stated in his behalf as is possible. Before concluding the charge, the Court said on page 196 of the typewritten transcript:

> "The Court: Now, I think I have covered these various topics. Have you anything, Mr. Kent, to suggest further?
>
> Mr. Kent: Nothing further, your Honor.
>
> The Court: Have you, Mr. McNally?
>
> Mr. McNally: I have nothing further, your Honor. Thank you."

Then, concluding, the Court further said:

> "If you are satisfied beyond a reasonable doubt that the People have proved their case; that the elements that I have defined to you have been proven beyond a reasonable doubt, find the defendant guilty accordingly."

The Court has spent much time in going through the entire record which was necessitated because no specific support for any of the allegations of error was set forth in the motion for a new trial. The question in a matter of this type is whether the defendant has had a fair and impartial trial and whether "* * * after an examination of the entire cause it shall affirmatively appear that the error complained of resulted in a miscarriage of justice." (Section 28.1096, M. S. A.)

It is the opinion of the Court that neither singularly or collectively does any or all of the allegations of error made merit the granting of a new trial. The defendant had a fair and impartial trial. The law on the entire subject was clearly stated to the jury. The case before the jurors was whether or not a man who had planned and carried out an armed robbery in which he fired a bullet through the heart of Louis Busker, resulting in his immediate death, was guilty of first degree murder or any of the lower degrees of homicide. The jury concluded that the defendant was sane when the crime was committed and, having reached that conclusion, it had no other function to perform except to decide the degree of homicide. The Court gave the defendant everything he possibly could be entitled to when the jury was charged that, under all the circumstances, it might conclude the defendant was guilty of one of the lower degrees of homicide. The jury spoke and its verdict must be respected.

The motion for a new trial is denied.

John P. O'Hara,
Judge of the Recorder's Court
of the City of Detroit.

ORDER DENYING APPLICATION FOR LEAVE TO APPEAL

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 12th day of October in the year of our Lord one thousand nine hundred and fifty-nine.

Present the Honorable John R. Dethmers, Chief Justice, Leland W. Carr, Harry F. Kelly, Talbot Smith, Eugene F. Black, George Edwards, John D. Voelker, Thomas M. Kavanagh, Associate Justices.

In this cause an application is filed by defendant for leave to appeal from an order of the Recorder's Court for the City of Detroit and a brief in opposition thereto having been filed by plaintiff and due consideration thereof having been had by the court. It is ordered that the application be and the same is hereby denied.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 14th day of October in the year of our Lord one thousand nine hundred and fifty-nine.

Donald F. Winters,
Clerk.

ORDER DENYING MOTION FOR RECONSIDERATION

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 24th day of November in the year of our Lord one thousand nine hundred and fifty-nine.

Present the Honorable John R. Dethmers, Chief Justice, Leland W. Carr, Harry F. Kelly, Talbot Smith, Eugene F. Black, George Edwards, John D. Voelker, Thomas M. Kavanagh, Associate Justices.

In this cause a motion is filed by defendant for a reconsideration of the order heretofore entered herein on October 12, 1959, and a brief in opposition thereto having been filed by plaintiff, and due consideration thereof having been had by the Court, it is ordered that the order heretofore entered herein on October 12, 1959 as aforesaid stand affirmed.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 27th day of November in the year of our Lord one thousand nine hundred and fifty-nine.

Donald F. Winters,
Clerk.